

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF KITSAP COUNTY
SUBSTANTIAL DEVELOPMENT PERMIT
NO. 529,

LOU BRENNAN & THOMAS BRENNAN,

Appellants,

v.

ALAN WINNINGHAM and KITSAP
COUNTY,

Respondents.

No. SHB 89-40

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER FOLLOWING
RECONSIDERATION

This matter came on for hearing before the Shorelines Hearings Board, William A. Harrison, Administrative Appeals Judge, presiding, and Board Members Judith A. Bendor, Chair, Wick Dufford, Harold S. Zimmerman, Nancy Burnett, Jon Wagner, and William Derry. The matter is an appeal from the granting of a shoreline substantial development permit for construction of a dock.

Appearances were as follows:

1. Appellants by Scott M. Missall, Attorney at Law.
2. Respondent, Winningham, by J. Tayloe Washburn, Attorney at Law.

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3. Respondent, Kitsap County, by M. Peter Philly, Deputy
Prosecuting Attorney.

The hearing was conducted at Seattle on March 27 and 28, 1990.
Gene Barker provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined. The Board viewed the site of the proposal in the company of Judge Harrison and the parties. From testimony heard and exhibits examined, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I.

This matter arises in Kitsap County in Blakely Harbor on Bainbridge Island.

II.

Historically, Blakely Harbor was the site of Port Blakely which in the 19th century included a large lumber mill and attendant rail transportation. Port Blakely was also a ship building center where sailing ships were constructed for the Pacific routes to Asia. In the mid and late 20th Century, however, nearly every sign of industrial use has vanished. Port Blakely Tree Farms, successor to the interests which operated the mill, has sold residential lots toward the mouth of the Harbor, some 40 or more years ago. These now comprise a quiet residential community of attractive waterfront homes. Port Blakely Tree Farms retains ownership of the land at the head of the Harbor, which is largely undeveloped.

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III.

Blakely Harbor is notable for its lack of docks relative to other harbors on Bainbridge island, such as Port Madison Bay and Eagle Harbor. This imparts a more natural appearance to Blakely Harbor.

IV.

The south shore of Blakely Harbor is more shallow than the north shore. The south shore has a long tidal run out over tidelands of sand or silt-clay mud.

Rather than attempting to construct a pier or dock over these tidelands, south shore residents have used buoys to moor their boats.

V.

Respondent, Alan Winninghan resides on the south shore adjacent to the Port Blakely Tree Farms holding. He presently moors his 21 foot boat at a buoy which is from 200 to 220 feet from his bulkhead. He also has a small mooring raft or float. The outside edge of his present float is 137 feet from his bulkhead. The float is secured by piling and has no connecting walkway to shore.

1 VI.

2 On February 2, 1989, Mr. Winningham applied to respondent Kitsap
3 County for a shoreline substantial development permit to construct a
4 dock at his home. The dock was to consist of a 147 foot fixed pier on
5 piling leading to a ramp connected to a mooring float. The dock was
6 to total 189 feet in length. That proposal was considered and
7 approved by Kitsap County which granted a shoreline permit on June 12,
8 1989. From that decision appellants Lou and Thomas Brennan appeal.
9 The Brennans reside on the south shore near the mouth of the Harbor.
10 They filed their request for review with this Board on July 10, 1989.

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12 VII.

13 The shoreline permit granted by Kitsap County contained these
14 conditions:

- 15 1. *The use of the pier is limited to non-commercial,*
16 *recreational uses of the property owner and his*
invited guests.
- 17 2. *The pier shall not be used for moorage of live*
18 *aboard boats.*
- 19 3. *The applicant shall be required to obtain all*
20 *necessary State and Federal permits.*
- 21 4. *The pier and dock will be a cooperative facility*
22 *with the owners of the two neighboring properties*
to the east. The owners of these properties (Jim
Smith and Paul Tucker) and their invited guests
will be permitted to use the pier and dock.

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5. The applicant be required to comply with paragraph 5 of the Policy Section of the Shoreline Management Master Program which states, "Size and length of piers and floating docks should be the minimum that provides the required service."

VIII.

Mr. Winningham has changed his proposed dock from that approved by Kitsap County to that shown in Exhibit R-70 of this record. The parties stipulate that the dock as shown in R-70 is before us for review. Relative to the permitted dock, the R-70 dock has a shorter overall length of 180 feet versus 189 feet, and a shorter fixed pier of 85 feet versus 147 feet. The proposed (R-70) dock would provide 6 feet of water depth at lowest tides making it suitable for use at any time. Mr. Winningham proposes to allow use of the dock by his two south shore neighbors to the east, the Tuckers and the Smiths. Mr. Winningham has stipulated his willingness to grant a recorded easement to facilitate this cooperative use. Mr. Tucker accepts the right to use this dock. Mr. Smith does not accept the right to use this dock. Mr. Winningham has also stipulated to shaded lighting on the dock which shall be switched on only when the dock is in use or for security purposes.

IX.

The site of the proposed dock is designated "Rural" by the Kitsap County Shoreline Master Program (KCSMP). Concerning the Rural

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1 environment the KCSMP states:

2 Definition: A Rural Environment is
3 defined as an area in which the
4 natural, agricultural or recreational
5 features predominate and where the use
6 by man results in only a light
7 modification of the natural
8 characteristics.

9 Purpose: The purpose of placing an area in Rural
10 Environment is to protect agricultural land from
11 urban expansion, restrict intensive development
12 along undeveloped shorelines, function as a buffer
13 between urban areas, maintain open spaces and
14 opportunities for recreational uses compatible with
15 agricultural activities, provide the opportunity for
16 rural living which is of lower unit intensity than
17 the semi-rural living, to provide an environment
18 where living is compatible with the natural systems,
19 and to regulate use activities which may change the
20 natural systems that establish the characteristic
21 nature of the environment. It is intended that
22 man's use activities will interact with the natural
23 systems. KCSMP p. 4-4.

24 The KCSMP defines "Piers and Floating Docks" as follows:

25 A pier is a fixed structure built over the water,
26 used as a landing place for marine transport or for
27 recreational purposes. A floating dock is a
platform built for the same purposes and attached
to the shore or a fixed pier by a loosely coupled
ramp. KCSMP, p. 7-13.

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XI.

20 The KCSMP states that:

21 "Piers and floating docks are permitted in the
22 Urban, Semi-Rural, Rural and Conservancy
23 Environments. (Emphasis added, KCSMP, Regulation
24 A.1., p. 7-13).

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XII.

The KCSMP sets forth the following policies for piers and floating docks:

1. *The cooperative uses of piers and floating docks should be encouraged. Priority should be given to the use of community piers and docks in all new major waterfront subdivisions.*
2. *The use of floating docks over piers should be encouraged in those areas where scenic values are high and where conflicts with recreational boaters and fisherman are not greatly increased.*
3. *Open pile piers should be encouraged where shore trolling is important and where there is sufficient longshore drift.*
4. *Boat docking facilities should not be located in ecologically sensitive areas.*
5. *Size and length of piers and floating docks should be the minimum that provides the required service.*
6. *Size and length should also be a minimum interference to navigation and other uses of the water area.*

(Numbered for reference, KCSMP, p. 7-13).

XIII

The KCSMP sets forth General Regulations for piers and floating docks which, in pertinent part, are:

B. General Regulations

2. *Where state harbor lines do not apply, piers and docks shall project the minimum distance necessary to service the appurtenant vessels and shall not create a hazard to navigation.*

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1 3. Individually owned, single family residence
2 piers and docks are permitted where it can be
3 shown that a joint use moorage facility is
4 not feasible. KCSMP, p. 7-14.

5 XIV.

6 The factual disputes in this appeal concern: 1) beach conditions,
7 2) littoral drift, 3) navigation, 4) view and aesthetics, and 5)
8 ecologically sensitive areas.

9 We make the following findings with regard to these issues.

10 XV.

11 Beach Conditions: The Winningham beach is unusual among
12 properties on the south shore. The common condition of extensive mud
13 or sandy shoals is interrupted by an area of deeper water. While sand
14 or mud shoals are to either side, the proposed dock would be between
15 shoals. This deeper water allows moorage closer to shore than at most
16 other places along the south shore beach. Consequently, moorage can
17 be obtained with the 180 foot dock as opposed to a longer dock which
18 might be required elsewhere.

19 XVI.

20 Littoral Drift: There is evidence of littoral drift, that is,
21 movement of sand along the beach by current or wave action. The
22 direction of littoral drift on the south shore is westerly towards the
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1 head of the bay. The Coastal Zone Atlas of Washington (KS 17E)
2 identifies the head of Blakely Harbor as a "notable accreting beach."
3 Despite the existence of littoral drift the sand pattern has remained
4 fairly stable in the time between 1976 and 1989 (as shown by Exhibits
5 R-75A and R-75B respectively). Appellants urge that shifting sand may
6 fill in the deeper water at the Winningham dock site rendering
7 continued moorage impractical. However, the magnitude of time for
8 such an occurrence would appear to be on the order of 20 years,
9 minimum, and thus does not pose a problem in the near future. At that
10 remote time when sand may impair moorage, lengthening the dock would
11 require further review and would not be automatically allowed. To the
12 extent that littoral drift is occurring at the dock site, the proposed
13 open pile construction would interfere less than would a dock which
14 floats over its entire length.^{1/}

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19 ^{1/} The evidence discloses only two dock proposals in Blakely Harbor
20 since adoption of the KCSMP in 1977. Both were for the south shore
21 property identified as "Hunter", though Exhibit A-22 shows that this
22 would be the present Tucker property. While these applications are
23 not before us, the evidence includes testimony that these were
24 applications for docks which floated over their entire length and thus
25 posed a potential interference with littoral drift. Moreover, the
26 longer tidal run out would have provided a less practical moorage for
27 a dock of the same length as this one. These factors appear to
distinguish the earlier applications from the one at hand.

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XVII.

Navigation: Blakely Harbor is a popular destination for boaters including cruising clubs. Visiting boats will often anchor near the head of the harbor. The deep water necessary for safe anchorage at all conditions is, however, north and west of the proposed dock site. Visiting boats do not now anchor so as to conflict with Mr. Winningham's boat when moored at its buoy or float. The proposed dock would provide moorage some 20 - 40 feet shoreward of the buoy. It would therefore widen the distance from Mr. Winningham's boat to the anchored boats. The use of open pilings will allow small boats to float under the pier at high tide. It is unlikely that the proposed dock would significantly affect navigation.

XVIII.

View and Aesthetics: The waterward end of the pier deck stands some 18 feet above ground, as proposed. A handrail would add another 4 feet. The 18 foot height is necessary to place the pier deck just above highest tides. A handrail is necessary for safety. Neither height is more than necessary. Appellant has not shown a significant impairment of view nor any significant adverse aesthetic impact by the proposed dock.

XIX.

Ecologically Sensitive Areas: The Coastal Zone Atlas (KS 17D) identifies most of Blakely Harbor as a critical biological habitat

1 for river otter. The only evidence presented on otter sightings was
2 one which occurred two years ago. The proposed dock is some 200 feet
3 east of a creek thought to be used by otters. Appellant has not shown
4 that the proposed dock would have a significant adverse impact on
5 river otter or their habitat in Blakely Harbor. Moreover, Kitsap
6 County has not classified the site in question as environmentally
7 sensitive under the State Environmental Policy Act or as an area such
8 as a marsh, wetland or estuary, of particular ecological sensitivity.

9 XX.

10 Any Conclusion of Law which is deemed a Finding of Fact is hereby
11 adopted as such.

12 From these Findings the Shorelines Hearings Board comes to the
13 following

14 CONCLUSIONS OF LAW

15 I.

16 Appellant, having requested review, bears the burden of proof in
17 this proceeding. RCW 90.58.140(7).

18
19 II.

20 We review the proposed development for consistency with the
21 applicable (Kitsap County) master program and the Shoreline Management
22 Act. RCW 90.58.140(2)(b).
23
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26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
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1 III.

2 The proposed dock is a "pier or floating dock" under the Kitsap
3 County Shoreline Master Program (KCSMP), p. 7-13. As such it is a
4 permitted type of use in the rural shoreline where proposed. KCSMP,
5 Regulation A.1., p. 7-13.

6 IV.

7 Due to the unusual deeper water at the Winningham site, the
8 proposed dock can reach a reliable moorage depth and yet be shorter
9 than needed elsewhere on the typically shoaled south shore. The dock
10 is the minimum necessary length to reach this moorage depth, and would
11 not create a hazard to navigation. The proposed dock is consistent
12 with KCSMP Regulation B.2. and the underlying policies 5 and 6, pp.
13 7-13 and 7-14.

14
15 V.

16 By being available to the use of the Winninghams and Tuckers, the
17 proposed dock is a joint use moorage. Thus it is consistent with the
18 preference for such moorage shown in KCSMP Regulation B.3. and the
19 underlying policy 1 favoring cooperative use of docks, pp. 7-13 and
20 7-14.

21 VI.

22 By the use of open pilings, the proposed dock minimizes the
23 potential interference with littoral drift and leaves open a passage
24

1 way for small boats to pass beneath it when tides permit. the
2 proposed dock is consistent with KCSMP policy 3, p. 7-13.

4 VII.

5 Although it uses open pilings rather than floating its entire
6 length, the proposed dock does not significantly harm scenic values.
7 It is thereby consistent with KCSMP policy 2, p. 7-13.

9 VIII.

10 The KCSMP policy 3 states that "Boat docking facilities should
11 not be located in ecologically sensitive areas." Notwithstanding this,
12 the KCSMP Regulations implementing this policy identify docks as a
13 permitted use in four of the five shoreline environments, Regulation
14 A.1., pp. 7-13. From this we conclude that ecological sensitivity of
15 a type generally found is not what the policy protects. Rather, an
16 unusual or uncommon degree of ecological sensitivity is contemplated.
17 This is consistent with testimony of the Kitsap County Shoreline
18 Planner who compared the policy to SEPA's "environmentally sensitive
19 area". See WAC 197-11-748. Appellant has not shown this to be an
20 environmentally sensitive area under SEPA nor an area of unusual or
21 uncommon ecological sensitivity. The proposed dock is consistent with
22 KCSMP policy 4, p. 7-13.

1 IX.

2 The proposed dock is consistent with development goals for the
3 rural environment. The purpose of designating an area as rural
4 environment is to restrict intensive development along undeveloped
5 shorelines. It is intended to provide an environment where living is
6 compatible with natural systems. These purposes are implemented by
7 use regulations which designate piers and floating docks as permitted
8 in the rural environment. KCSMP, Regulation A.1., p. 7-13. Viewing
9 the proposed dock and its surroundings against these objectives and
10 regulations we conclude that the dock is consistent with goals in the
11 rural environment, KCSMP, Section 4, p. 4-4.

12
13 X.

14 Appellants have not shown that the proposed dock violates
15 policies for shorelines of state wide significance or other policies
16 within RCW 90.58.020 or elsewhere in the Shorelines Management Act.

17
18 XI.

19 Respondent Winningham's proposed dock provides adequate moorage
20 for the purposes intended. Consistent with Regulation B.2. minimizing
21 dock projection, the existing Winningham float and piling and mooring
22 buoy should be removed upon construction of the proposed dock.

XII.

The proposed dock meets the requirements of both the KCSMP and Shoreline Management Act provided that the conditions placed by Kitsap County are retained and modified as follows:

1. *The use of the pier is limited to non-commercial, recreational uses of the property owner and his invited guests.*
2. *The pier shall not be used for moorage of live aboard boats.*
3. *The applicant shall be required to obtain all necessary State and Federal permits.*
4. *The pier and dock will be a cooperative facility with the owner of the neighboring property to the east. The owner of this property (Paul Tucker) and invited guests will be permitted to use the pier and dock. An easement consistent with this condition shall be recorded.*
5. *The proposed development shall conform to Exhibit R-70 in the record of Brennan v. Winningham, SHB No. 89-40 (1990).*
6. *The dock lighting shall be shaded and turned on only when the dock is in use or to see that the dock is secure.*
7. *The existing Winningham float and piling and mooring buoy shall be removed.*

Each condition above is supported by the evidence before us and each is necessary to conform the proposal to the KCSMP and Shoreline Management Act.

XIII.

The appellants have been forthright in stating that their

1 opposition to the proposed dock arises in large part from the
2 precedent which would be set for future dock proposals in Port Blakely
3 Harbor. Appellants illustrate their concern in exhibit A-12 which
4 cites a total of 86 homes or lots on the Harbor, including 29
5 shoreline lots on the south side and 22 shoreline lots on the north
6 side attributed to the largely undeveloped Port Blakely Tree Farm
7 holding. In measuring the impact of this decision as precedent,
8 however, the definition of precedent must be recalled to mind.

9 Black's Law Dictionary, Revised Fourth Edition, defines precedent as:

10 *An adjudged case or decision of a court of justice,*
11 *considered as furnishing an example or authority for*
12 *an identical or similar case afterwards arising or a*
similar question of law.

13 Thus, were we to review a future dock proposal "for an identical or
14 similar case" or a "similar question of law" this case would serve as
15 precedent. Yet it is equally clear that Port Blakely Harbor is
16 capable of yielding a variety of natural conditions or use patterns
17 which may or may not provide an identical or similar case or similar
18 question of law. Thus it does not detract from the rule of precedent
19 to say that future dock proposals should be considered on a case by
20 case basis.

21 XIV.

22 Any Finding of Fact which is deemed a Conclusion of Law is hereby
23 adopted as such.

24 From these Conclusions the Board enters this

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
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ORDER

The shoreline substantial development permit granted by Kitsap County to Alan Winningham is remanded for issuance in the same form as previously granted but with the conditions enumerated in Conclusion of Law XII, hereof. As so amended, the permit is affirmed.

DONE at Lacey, Washington, this 5th day of October, 1990.

SHORELINES HEARINGS BOARD


JUDITH A. BENDOR, Chair

WICK DUFFORD, Member


HAROLD S. ZIMMERMAN, Member


NANCY BURNETT, Member


JON WAGNER, Member


WILLIAM DERRY, Member



WILLIAM A. HARRISON
Administrative Appeals Judge

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
FOLLOWING RECONSIDERATION
SHB 89-40